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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

315 U.S. 800

No. 810.

FRANK J. BOEHM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. .....

FRANK J. BOEHM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court:

Petitioner Frank J. Boehm respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner in an indictment of five counts was charged with perjury in violation of Section 125 of the Criminal Code, 35 Stat. 1111, 18 U. S. C. A., Section 231 (R. 8). He was tried in the United States District Court at St. Louis, Missouri, the jury acquitting him on three counts of the indictment and convicting him on two (R. 1114). The

maximum sentence of five years in a penitentiary and a two-thousand-dollar fine on each count was imposed. The penitentiary sentences were ordered to run concurrently (R. 1118, 1119). The judgment of conviction was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit in an opinion filed November 6, 1941 (R. 1239). Petition for rehearing was denied November 26, 1941 (R. 1313).

The offenses charged were alleged to have been committed when petitioner testified before representatives of the Securities and Exchange Commission during an investigation of the affairs and practices of the Union Electric Company of Missouri by the Commission. Petitioner at the time in question was executive vice-president of the Union Electric Company of Missouri (R. 135).

The indictment charged (R. 9, 16-18) that the investigation in question was conducted under the Securities Act of 1933, Securities Exchange Act of 1934 and Public Utility Holding Company Act of 1935; that Union Electric Company of Missouri had securities registered under the Securities Act of 1933; had registered securities upon the National Securities Exchange under the Securities Act of 1934; was a holding company within the meaning of the Public Utility Holding Company Act of 1935, and a subsidiary of the North American Company, a registered holding company within the meaning of that Act. It was further charged that the investigation was to determine the facts with respect to the alleged maintenance of a slush fund by officers of the Union Electric Company; padding of expense accounts submitted to and paid by said company; the alleged securing of money by means of rebates and kick backs from persons, firms and corporations with which the Union Electric Company and its subsidiary companies dealt; the making of political contributions, and the accuracy of registration or financial state-

ments filed by the Union Electric Company of Missouri and the North American Company with the Commission.

In the first count of the indictment petitioner was charged with having falsely testified at a hearing Decem-19, 1938, that he had never approved any expense account which was padded or upon which the padding was done with his authority (R. 11).

In the second count it was charged that he falsely testified at a hearing on January 16, 1939, (a) that his expense accounts represented actual expenditures made by him and reflected substantially the purposes for which made; (b) that he had never put his initials or o. k. on any expense account which he knew to be padded; (c) that there had never been a practice of gaining money through the mechanics of kick backs or rebates from attorneys or supply houses (R. 13).

The third count charged that he falsely testified at a hearing February 18, 1939, that he knew of no slush fund maintained by the Union Electric Company of Missouri (R. 15).

The fourth count charged that he falsely testified July 10, 1939, (a) that he did not pad his expense accounts and that those he submitted corresponded exactly with what his expenses were as nearly as he could make them; (b) that he took all of the trips that were listed on his expense vouchers during a certain period of time; (c) that a fund had never been maintained by the Union Electric Company of Missouri for political purposes, and that any money in his office, on his person, or in his safe was his personal fund; (d) that no money was obtained by means of kick backs or rebates from attorneys (R. 19).

The fifth count charged that he falsely testified at a hearing on July 11, 1939, (a) that there was no practice of obtaining money by kick backs or rebates through pur-

chases made, and that no money was derived off the record or in any other manner for a slush fund; (b) that he had never made any political contributions for any candidate for public office on behalf of the Union Electric Company of Missouri; and (c) that he had never made a political contribution in an amount in excess of one hundred dollars (R. 21).

The Government, in presenting its case at the trial, introduced in evidence those portions of a transcript of petitioner's testimony given on the occasions mentioned in the indictment, which were alleged to be false (R. 343 to 365).

Thereafter the Government introduced voluminous evidence consisting of testimony of witnesses and exhibits, which was offered for the purpose of proving that there existed an alleged practice of obtaining rebates from supply houses and from insurance brokers; to establish an alleged practice of obtaining funds through kick backs from attorneys of a portion of fees charged; seeking to establish a practice of padding expense accounts, and that appellant padded his expense accounts, and that from a fund raised by such methods political contributions were made.

A number of the principal witnesses for the Government admitted at the trial that they had previously given testimony before representatives of the Securities and Exchange Commission during the course of the investigation which was contrary to the testimony which they gave at the trial; that they were thereafter granted immunity and changed their testimony. They testified that the prior conflicting testimony had been false, and that which they gave at the trial was true. One denied this though admitting having been granted immunity. (Record references to these witnesses is given hereafter in this statement.) Petitioner repeatedly sought to obtain a transcript of this prior contradictory testimony for the purpose of cross-

examining these witnesses for the purpose of impeachment, as it would be relevant and material for that purpose and would go directly to the weight and credibility of their testimony. Every request therefor was denied, as the following citations from the record will demonstrate:

Prior to the trial petitioner presented an application for an order to produce a transcript of this prior testimony of some of these witnesses (R. 256), which was overruled (R. 258). At the commencement of the trial petitioner presented an application for a subpoena duces tecum directed to the representatives of the Securities and Exchange Commission for a transcript of this prior testimony (R. 258), which was denied (R. 261). Thereafter, and during the course of the trial, further application for a subpoena duces tecum directed to the officers and representatives of the Securities and Exchange Commission and to the United States District Attorney for a transcript of this testimony was presented (R. 262), which was denied (R. 264). During the cross-examination of some of these witnesses, when it developed they had given prior contradictory testimony, a request was made by counsel for petitioner for a transcript of this testimony, which in every instance was denied. These instances may be found during the cross-examination of the following Government witnesses: B. P. Alschuler (R. 387-389); Rex Fowler (R. 398); Harry Williamson (R. 466, 908); Frederick J. Martin (R. 968), and during the direct examination of Harry C. Coles of the Securities and Exchange Commission, who was recalled by petitioner (R. 1078, 1079).

Of these witnesses Herman Spoehrer, whose testimony (R. 621, 674, 692) was to the effect that he had collected moneys as service charges, discounts or return premiums from insurance companies and either disbursed it on instructions from petitioner or delivered it to him, and had

also padded his expense accounts, testified (R. 634, 635) that he had been granted immunity, and denied (R. 638) that he had ever given prior contradictory testimony, although he had testified before the representatives of the Securities and Exchange Commission.

Another of these witnesses, Eugene R. Kropp, whose testimony pertained to returns of money from insurance companies as a result of surveys, service charges, fleet or experience discounts (R. 638-642), and that he had padded his expense accounts and turned the excess over to Spoehrer (R. 742-744), testified (R. 758) that he had given prior contradictory testimony before the Commission representatives, then had been given immunity and changed his testimony.

George K. Miltenberger, who testified (R. 567, 568) with reference to alleged return of money from a supply company, which he stated he delivered to petitioner, and (R. 803-806) that he padded his expense accounts and turned the excess over to petitioner, admitted that he had given prior contradictory testimony before the representatives of the Commission, had been granted immunity and then changed his testimony (R. 568, 569, 808).

B. P. Alschuler, a lawyer, who testified (R. 376-380) that he had returned part of fees collected to officers of the company, admitted that he had given testimony before representatives of the Commission different from that given at the trial (R. 382, 386, 390, 391). That he had been threatened with criminal prosecution and disbarment proceedings (R. 385), was then granted immunity (R. 391) and changed his testimony.

Another of these witnesses, Rex Fowler, a lawyer, testified that he had returned to company officials part of fees collected (R. 396, 397), and admitted (R. 398) that he had

given prior contradictory testimony, then was granted immunity and changed his testimony (R. 399).

E. B. Hamilton, a lawyer, testified (R. 474-480) that he had returned to officials of the company a portion of moneys received as fees. He admitted having given prior contradictory testimony before representatives of the Commission, but denied that any promises of immunity had been made before he changed his testimony (R. 491).

Another of these witnesses, L. H. Keller, testified (R. 533-550) with reference to alleged rebates made on orders for supplies, and admitted giving prior conflicting testimony before the Commission, was then granted immunity and changed his testimony (R. 554).

Harry Williamson testified (R. 458-462) that he received sums of money from Fowler and Alschuler which he delivered to officials of the company. He admitted (R. 464-467) that he gave prior contradictory testimony before representatives of the Commission. That an intimation of prosecution for perjury was then made (R. 468, 469, 470); that he was then granted immunity and changed his testimony (R. 473).

Albert C. Laun, principal witness for the Government on all phases of the case (R. 970-996), testified (R. 997) that by reason of prior testimony he had been indicted for perjury and had pleaded guilty and been sentenced to the penitentiary and returned therefrom for the purpose of testifying at the trial. He denied (R. 998) that he had any agreement with representatives of the Securities and Exchange Commission that on making a plea no punishment would be inflicted, but admitted (R. 1000) that he had a hearing for parole pending which was to be heard a short time later.

Another of these witnesses, Frederick J. Martin, testified (R. 965) concerning alleged political campaign con-

tributions, and admitted that he had given prior conflicting testimony before representatives of the Securities and Exchange Commission; that thereafter he was indicted, pleaded guilty, made an application for probation, and while same was pending again testified before representatives of the Commission and changed his testimony, and thereafter the application for probation was granted (R. 966, 967).

The Government's position at the trial was that petitioner had no right to a transcript of this prior contradictory testimony of these witnesses, for the reason that it was given in an investigation by the Securities and Exchange Commission which was a confidential and secret proceeding, and that nothing therein occurring could be divulged. The further reason was advanced, that cross-examination concerning it was inadmissible in any event, because the witnesses admitted when testifying that they had given prior contradictory testimony which they branded as false, and that this admission alone precluded any further inquiry along this line.

On appeal the additional position was taken that petitioner's counsel had been permitted to cross-examine these witnesses at length with reference to the prior conflicting testimony.

In disposing of the contention made by petitioner that this was prejudicial error, the Circuit Court of Appeals held that the trial court was in error in refusing to order production of the prior sworn testimony of these witnesses, but that it was harmless error (R. 1262-1266). The opinion states (R. 1266):

> "* * * we do not declare approval of the course which was taken by the trial Court. We think the proper course in the situation which was presented to it by the defendant's demands is indicated by the Supreme Court in United States v. Socony Vacuum Oil

Co., supra. Whenever it is timely presented to the Court by a defendant in a criminal case that the transcripts of testimony of Government witnesses against him given before investigators contain evidence material to his defense at the trial, and demand is made therefor, the Court should issue process for the production thereof and should examine the same and should make its rulings as to admissibility or use in the trial of any part of the whole matter in the light of the transcripts before the Court. In making such rulings the Court is bound to exercise sound judicial discretion to accord the defendant the fair trial to which he is entitled and at the same time to confine the procedure to consideration of competent, relevant and material evidence. In failing to adhere to that course in this case, and in refusing absolutely to take any steps to compel production of the demanded transcripts, the trial Court was in error;"

The holding of the Circuit Court of Appeals that the error was harmless is, in effect, that the error would not be deemed prejudicial because the accused made no affirmative showing that his rights were prejudiced and placed on him the burden of showing that these transcripts, the right to examine which had been denied him, contained material matter of defense. The opinion states (R. 1263):

"The contention that appellant would have thrown some light on the issues more favorable to himself if he had had the transcripts is entirely speculative. The evidence affords no ground for any such belief and there is no statement throughout the briefs to justify an inference that such belief really exists."

And further (R. 1266):

"But in this case, where it is apparent that no essential ingredient of the offense was in any way dependent upon any matter contained in the transcripts and there is no reason to believe that any matter contained therein was competent, relevant or material

> matter of defense 'to order a new trial would be to violate the standards of Sec. 269 of the Judicial Code (U. S. C., Sec. 391), since the substantial rights of the defendant were not affected.' "

The opinion also found, contrary to the record, that petitioner was accorded the right of full cross-examination of these witnesses as to their prior contradictory testimony (R. 1262, 1265).

At the trial approximately twenty prominent citizens of the community testified that petitioner bore the highest reputation for veracity and honor (R. 1040, 1054, 1055, 1057-1061, 1066). Petitioner requested the Court to charge the jury:

> "The jury are instructed that the circumstances of a case may be such that an established reputation for good character, standing alone, may create a reasonable doubt, although without it the other evidence may be convincing,"

which was refused (R. 1092). Petitioner then requested the following instruction:

> "You are instructed that evidence of defendant's good character is in the same category as other factual evidence and must be considered by you in your deliberations and may of itself, if believed by you, create a reasonable doubt where otherwise no reasonable doubt would exist."

This request was refused (R. 1093).

On this issue the Court charged the jury (R. 1103) to the effect that if the jury found that defendant bore a good reputation, then such fact was to be considered with the other facts and circumstances of the case. That if it should, when considered with all the other evidence, raise a reasonable doubt as to the defendant's guilt, then he should be acquitted, and concluded with this statement:

> "But if all the evidence in the case, including that

which has been given on the matter of prior good reputation, convinces you of his guilt beyond a reasonable doubt, then his previous good reputation cannot excuse, mitigate or palliate such guilt to any extent whatever."

In overruling petitioner's contention that the refusal of his requested charge was error the Circuit Court of Appeals held in its opinion (R. 1274) that the evidence of guilt was convincing and no one could believe that proof of reputation, standing alone, was sufficient to raise a doubt of guilt, and that therefore the law put no obligation on the Court to tell the jury that it might do so, that the instruction quoted was good and there was no error in refusing petitioner's requested charge.

With reference to proof required for conviction in a perjury case, the Court charged the jury (R. 1099, 1104) to the effect that every material allegation in the indictment might be shown by a single witness except that the evidence was false and the accused did not believe it to be true, which must be shown by two witnesses or by one witness with circumstances of satisfactory corroboration. Petitioner requested the Court to charge the jury (R. 1093) that to convict of perjury it must be found that either two living witnesses testified of their own knowledge to the perjury or a living witness, plus corroborative evidence, that "circumstantial evidence of itself or corroborative evidence of itself is not sufficient to support a charge of perjury." This request was refused.

The Court further charged in direct conflict with the above-quoted portions of the given charge as follows (R. 1102):

> "I need scarcely tell you that proof of a crime may be either by direct or circumstantial evidence. Either is sufficient."

There then follows an explanation of what constitutes di-

rect evidence and what constitutes circumstantial evidence, and this portion of the charge then concludes (R. 1103):

> "These circumstances, I charge you, ought to be consistent with each other and consistent with the guilt of the defendant, and inconsistent with any reasonable hypothesis of the defendant's innocence."

With reference to the contention that there was an irreconcilable conflict in the charge on the kind of proof required, the Circuit Court of Appeals held (R. 1270) that the requirement of the law to sustain conviction for perjury was properly stated and then continues:

> "It appears that in the part of the Court's general instructions relating to the kind of proof by which commission of a crime may be made, the Court declared the general rule that it may be by direct or circumstantial evidence, either of which is sufficient, and the two kinds of evidence were described. That the general law was correctly stated is not questioned and it is clear from the instructions given that the jury was fully informed of the special exception applicable to the perjury charge. We find no error in giving or refusing instructions concerning the quantum of evidence upon the perjury charge."

The case was submitted to the jury and they retired at 12:45 p. m. July 25th, 1940, and at 2:37 p. m. July 26th, 1940, after being out for approximately twenty-six hours, the jury was ordered by the Court into the court room, whereupon the Court inquired if they had as yet arrived at a verdict and upon being informed that no verdict had been reached, the Court proceeded to give a supplemental charge (R. 1109). This charge is quite lengthy and for that reason is not here set out. It appears in the record at pages 1109 to 1111. In general it stressed the fact that the trial had been long and expensive and that a failure to reach a verdict would necessitate another equally ex-

pensive trial. It repeatedly emphasized the fact that a verdict should be returned. It contained repeated admonitions with reference to the duty of jurors to accord deference to each other's opinions and charged them that they should come to some agreement, at least upon some of the counts, and concluded that by adopting the method outlined in the Court's supplemental charge they would inevitably come to an agreement and a just verdict, but that on the other hand, "a dogged persistence not to listen to a fair discussion of the evidence or listen to fair argument, or listen to persuasive evidence or reason, is destructive of justice and has no place in the jury box."

Immediately upon the conclusion of this charge petitioner's counsel (R. 1111) excepted thereto on the ground that the case having been under submission for twenty-six hours, it was apparent that some of the jurors had a reasonable doubt and that the defendant was entitled to have that reasonable doubt determined in his favor, rather than to have the Court bring pressure upon the jury by giving a coercive charge admonishing them to reach a compromise between the counts of the indictment. Counsel then further moved the Court to discharge the jury and declare a mistrial, all of which were overruled (R. 1113). The jury retired at 2:52 p. m. immediately following the giving of this supplemental charge (R. 1113), and at 3:29 p. m., after an interval of only thirty-seven minutes, returned a verdict of guilty on counts 4 and 5 of the indictment and of acquittal on counts 1, 2 and 3 (R. 1114).

The Circuit Court of Appeals in its opinion overruled petitioner's contention that this charge was coercive and therefore constituted error (R. 1275), apparently disposing of the fact that the jury considered the case for twenty-six hours by stating that the issues were simple and the evidence of guilt such that there was little room for

reasonable doubt, but that petitioner was a man of impressive personality and the ability and energy of his counsel tended to obscure the obvious. The opinion states (R. 1276):

> "It was plainly the duty of the trial judge to seriously and earnestly impress upon the jury that they also had a sworn duty transcending personal inclination, to make true deliverance between the government and the accused. As the judge said nothing to tilt the scale in the jury's hands, either for or against the appellant, it cannot be said that he improperly coerced the verdict."

B.

QUESTIONS PRESENTED.

1. Did petitioner in this case, as disclosed by the record, have a fair trial?

2. Where a court has held in a criminal case that an accused under his right to a fair trial is entitled to have produced transcripts of prior contradictory testimony given by material Government witnesses against him, can the denial of this constitutional right be harmless error?

3. Under Section 269 of the Judicial Code (28 U. S. C. A. 391) is the burden on defendant in a criminal case to show affirmatively that he was not prejudiced by error which affects his substantial rights?

4. In a criminal case, is the burden on defendant cross-examiner to affirmatively show that transcripts of prior contradictory testimony given by witnesses for the Government, which he has been denied the right to see, contained relevant and material matter for cross-examination?

5. In a criminal case, does limitation of cross-examination by defendant of the principal Government witnesses

concerning their prior contradictory sworn testimony constitute prejudicial error?

6. In a criminal case, where evidence of good character on the part of defendant has been produced, is he entitled to an instruction that such evidence alone is sufficient to raise a reasonable doubt?

7. In a perjury case, can error in refusing to instruct the jury that circumstantial evidence alone is not sufficient to support a conviction, and in charging the jury that circumstantial evidence alone is sufficient, be cured by another portion of the charge stating the correct rule?

8. In a criminal case, after the jury has considered the issues for twenty-six hours without agreement and then, after receiving an additional charge, it returns a verdict in thirty-seven minutes acquitting on three counts of the indictment and convicting on two, can it be said that this supplemental charge was not coercive, where the charge stresses the length and expense of the trial and that failure to agree would necessitate another expensive trial; repeatedly emphasizes that a verdict should be returned, and contains repeated admonitions that the jurors accord deference to each other's opinions, and that a dogged persistence not so to do is destructive of justice, and that they should come to an agreement at least upon some of the counts, and states that if they follow the suggestions made in said charge they would inevitably agree?

C.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. (a) The opinion of the Circuit Court of Appeals holds that petitioner under his right to a fair trial was entitled to have the transcript of the prior contradictory testimony

of the principal witnesses against him produced, examined by the trial judge, and a determination made as to what portions thereof might be used for impeachment; that the refusal of the trial court so to do was error, but that such error was harmless. This decision is in effect that the denial of the constitutional right to a fair and impartial trial is harmless error, and it is deemed harmless because the accused did not make an affirmative showing that he was prejudiced thereby, and that therefore under Section 269 of the Judicial Code the judgment must be affirmed. In these respects and in the interpretation placed upon Section 269 of the Judicial Code the opinion is in conflict with the decisions of this Court in the following cases:

McCandless v. United States, 298 U. S. 342, 347;
Williams v. Great Southern Lumber Co., 277 U. S. 19, 26;
United States v. River Rouge Co., 269 U. S. 411, 421.

It is also in conflict with the following decisions of other circuits:

United States v. Dressler, 112 Fed. (2d) 972, 978 (7th Cir.);
Little v. United States, 73 Fed. (2d) 861, 866 (10th Cir.);
Lynch v. Oregon Lumber Co., 108 Fed. (2d) 283, 285 (9th Cir.).

(b) The opinion of the Circuit Court of Appeals holds that the trial court did not commit error by denying petitioner the right of cross-examination of these witnesses concerning their prior contradictory testimony (R. 1262). This holding is in conflict with the following decisions of this Court:

Alford v. United States, 282 U. S. 687, 691;
District of Columbia v. Clawans, 300 U. S. 617, 632.

(c) The opinion of the Circuit Court of Appeals places the burden upon the accused to affirmatively show that these transcripts contained relevant and material testimony which would have been of assistance to him for the purpose of impeaching these witnesses (R. 1263, 1266). This ruling is in conflict with the decision of this Court in

Alford v. United States, 282 U. S. 687, 691.

2. The opinion of the Circuit Court of Appeals in holding that it was not error to refuse petitioner's requested charge to the effect that an established reputation for good character alone may create a reasonable doubt, although without it the other evidence might be convincing, is in conflict with the decision of this Court in

Edington v. United States, 164 U. S. 361, 366,

and is also in conflict with the Court of Appeals for the District of Columbia and the Circuit Court of Appeals for the Seventh Circuit in the following cases:

Egan v. United States, 287 Fed. 958, 968 (C. A. D. C.);

Jones v. United States, 289 Fed. 536, 538 (C. A. D. C.);

Snitkin v. United States, 265 Fed. 489, 491 (C. C. A. 7th).

3. The trial court's charge to the jury in this, a perjury case, that circumstantial evidence alone was sufficient proof of a crime, was an erroneous statement of the law and it was error to refuse the requested charge that circumstantial or corroborative evidence of itself is not sufficient to support a charge of perjury. See:

Clayton v. United States, 284 Fed. 537, 539 (C. C. A. 4th);

United States v. Otto, 54 Fed. (2d) 277, 279 (C. C. A. 2nd);

Phair v. United States, 60 Fed. (2d) 953, 954 (C. C. A. 3rd).

The opinion of the Circuit Court of Appeals admits this, but holds that in other portions of the charge the jury was fully informed of the special exception applicable to a perjury case and that therefore no error was committed. In so holding the opinion is in conflict with the decision of this Court in

Mills v. United States, 164 U. S. 644, 646,

and with the following decisions of other Circuit Courts of Appeal:

De Groot v. United States, 78 Fed. (2d) 244, 248 (C. C. A. 9th);
Nicola v. United States, 72 Fed. (2d) 780, 787 (C. C. A. 3rd).

4. The opinion of the Circuit Court of Appeals in holding that the supplemental charge given to the jury after the case had been under submission for twenty-six hours was not coercive, and therefore did not constitute error, has so far departed from the accepted and usual course of judicial proceedings and sanctioned such departure by the lower court as to call for an exercise of this Court's power of supervision.

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Judicial Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, and for a complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 11,799, Criminal, Frank J. Boehm, appellant, versus United States of America, appellee, and that the said

judgment of the said Circuit Court of Appeals for the Eighth Judicial Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

FRANK J. BOEHM,

By JOHN S. LEAHY,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit has not been officially reported. Said opinion was filed November 6, 1941, and appears in the record beginning at page 1239.

II.

JURISDICTION.

1. The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, 43 Stats. 938, Sec. 1217, 28 U. S. C. A. 347 (a).

2. The date of the judgment to be reviewed is November 6, 1941 (R. 1277). A petition for rehearing was denied November 26, 1941 (R. 1313).

3. Petitioner was indicted and convicted on a charge of perjury in violation of Section 125 of the Criminal Code, 35 Stat. 1111, 18 U. S. C. A., Sec. 231 (Indictment, R. 8, 16, 22).

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading A in the petition, and in the interest of brevity the statement is not here repeated.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred:

(a) In finding and holding that the refusal of the trial court to order production of a transcript of the prior contradictory testimony of the Government's principal witnesses for the purpose of cross-examination and impeachment, while error, was harmless.

(b) In holding in effect that there was no prejudicial error, because the petitioner made no affirmative showing that his rights were prejudiced. Thus, construing Section 269 of the Judicial Code as placing the burden of showing prejudicial error on the party complaining. This is an erroneous construction of said section and in conflict with this Court's interpretation thereof.

(c) By finding and holding contrary to the record that petitioner was not limited in the exercise of his right of cross-examination of the witnesses in question, and that all of the witnesses were fully cross-examined and impeached.

(d) In placing upon petitioner the burden of affirmatively showing that the transcripts of the prior contradictory testimony contained relevant and material testimony, which would have been of assistance to him for the purpose of impeachment, when neither petitioner nor his counsel had any opportunity to examine said transcripts.

2. The Circuit Court of Appeals erred in holding that it was not error to refuse petitioner's requested charge to the effect that an established reputation for good character alone may create a reasonable doubt, although without it the other evidence might be convincing, and to charge the jury to the effect that if all the evidence in the case, including that on good reputation, convinced the

jury of petitioner's guilt beyond a reasonable doubt, then his previous good reputation could not excuse, mitigate or palliate such guilt to any extent whatever.

3. The Circuit Court of Appeals erred in holding that it was not error to refuse the requested charge that circumstantial evidence of itself would not support a charge of perjury and to charge the jury that circumstantial evidence alone was sufficient proof of the crime, for the reason that in other portions of the charge the jury was instructed as to the proper rule applicable to a perjury case.

4. The Circuit Court of Appeals erred in finding and holding that the supplemental charge given to the jury after it had been out twenty-six hours without having reached an agreement, which was followed in thirty-seven minutes by a verdict of conviction on two counts of the indictment and acquittal on three counts, was not coercive and did not constitute prejudicial error, and in finding that this supplemental instruction was substantially the same as that approved by this Court in Allen v. United States, 164 U. S. 492, 501, and that a similar charge was approved by this Court in Allis v. United States, 155 U. S. 117.

V.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Point A. The decision below is contrary to and in conflict with prior decisions of this Court and other Circuit Courts of Appeal in holding, that the error committed by the trial court in refusing to order production of a transcript of the prior contradictory testimony of the Government's principal witnesses for impeachment purposes, was not prejudicial because petitioner did not make an affirmative showing that he was prejudiced thereby; thus construing Section 269 of the Judicial Code as placing the burden of showing prejudicial error on the party complaining.

McCandless v. United States, 298 U. S. 342, 347;
Williams v. Great Southern Lumber Co., 277 U. S. 19, 26;
United States v. River Rouge Co., 269 U. S. 411, 421;
United States v. Dressler, 112 Fed. (2d) 972, 978 (C. C. A. 7th);
Little v. United States, 73 Fed. (2d) 861, 866 (C. C. A. 10th);
Lynch v. Oregon Lbr. Co., 108 Fed. (2d) 283, 285 (C. C. A. 9th).

Point B. The finding and holding below that petitioner was not limited in the exercise of his right of cross-examination of the Government's principal witnesses, and that these witnesses were fully cross-examined and impeached, is not supported by the record; and the decision below is contrary to and in conflict with prior decisions of this Court, the court below and other Circuits, in holding that petitioner was not erroneously denied the right of cross-examination of these witnesses.

Alford v. United States, 282 U. S. 687, 691;

District of Columbia v. Clawans, 300 U. S. 617, 632;
Heard v. United States, 255 Fed. 829, 832 (C. C. A. 8th);
Searway v. United States, 184 Fed. 716 (C. C. A. 8th);
Chicago, M. & St. P. Ry. Co. v. Harrelson, 14 Fed. (2d) 893, 896 (C. C. A. 8th);
Henderson v. United States, 20 Fed. (2d) 90 (C. C. A. 8th);
Tacoma Ry. & Power Co. v. Cothary, 235 Fed. 872 (C. C. A. 9th);
United States v. Graham, 102 Fed. (2d) 436 (C. C. A. 2nd).

Point C. The decision below is contrary to and in conflict with a prior decision of this Court in placing the burden upon petitioner to affirmatively show, that the transcripts of prior contradictory testimony of these witnesses contained relevant and material matter, which would have assisted him in his defense by impeachment of these witnesses.

Alford v. United States, 282 U. S. 687, 692.

Point D. The decision below is contrary to and in conflict with prior decisions of this Court, the court below and other Circuit Courts of Appeal in holding that the refusal of petitioner's requested charge that an established reputation for good character alone might create a reasonable doubt, although without it the other evidence might be convincing, WAS NOT ERROR.

Edington v. United States, 164 U. S. 361, 366;
Egan v. United States, 287 Fed. 958, 968 (C. A. D. C.);
Jones v. United States, 289 Fed. 536, 538 (C. A. D. C.);
Snitkin v. United States, 265 Fed. 489, 491 (C. C. A. 7th);
Estabrook v. United States, 28 Fed. (2d) 150, 154 (C. C. A. 8th);

Perara v. United States, 235 Fed. 515, 517 (C. C. A. 8th);
Searway v. United States, 184 Fed. 716 (C. C. A. 8th).

Point E. The Court's charge to the jury that circumstantial evidence alone was sufficient proof of the crime was an erroneous statement of the law, and the Court erred in refusing petitioner's requested charge that circumstantial or corroborative evidence of itself would not support a charge of perjury.

Clayton v. United States, 284 Fed. 537, 539 (C. C. A. 4th);
United States v. Otto, 54 Fed. (2d) 277, 279 (C. C. A. 2nd);
Phair v. United States, 60 Fed. (2d) 953, 954 (C. C. A. 3rd).

The decision below is contrary to and in conflict with prior decisions of this Court and other Circuit Courts of Appeal in holding that this did not constitute error because the jury was properly instructed as to the quantum of proof required in a perjury case in another portion of the charge.

Mills v. United States, 164 U. S. 644, 646;
De Groot v. United States, 78 Fed. (2d) 244, 248 (C. C. A. 9th);
Nicola v. United States, 72 Fed. (2d) 780, 787 (C. C. A. 3rd).

Point F. The decision below in holding that the supplemental charge was not coercive when the jury, after having had the case under consideration for twenty-six hours without agreement, returned a verdict of guilty on two counts of the indictment and acquittal on three counts thirty-seven minutes after the charge was given, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power

of supervision, and is contrary to and in conflict with prior decisions of the court below and other circuits.

Stewart v. United States, 300 Fed. 769, 785 (C. C. A. 8th);

Nigro v. United States, 4 Fed. (2d) 781, 785 (C. C. A. 8th);

Edwards v. United States, 7 Fed. (2d) 598, 602 (C. C. A. 8th);

C. & E. I. Ry. Co. v. Sellars, 5 Fed. (2d) 31, 32 (C. C. A. 8th);

Gideon v. United States, 52 Fed. (2d) 427, 431 (C. C. A. 8th);

Peterson v. United States, 213 Fed. 920, 924 (C. C. A. 9th).

POINT A.

[Specification of Errors 1 (a), (b).]

The opinion of the court below holds (R. 1266) that the trial court erred in refusing to order production of prior contradictory testimony of the principal witnesses for the Government which was sought by counsel for petitioner for the purpose of impeachment. It was held (R. 1266) that, after the production of the transcript, the trial judge should have examined it and determined what portions of it might be used in the trial; that in making such rulings the Court was bound to exercise sound judicial discretion "to accord the defendant the fair trial to which he is entitled." Thus, the basic reason for petitioner's right to production of this transcript and the determination of what portions of it might be relevant and material for use at the trial in impeachment of the witnesses, was his right to a fair trial. This, however, was held (R. 1266) to be harmless error for the reason, that the Court found that the witnesses had been fully cross-examined (this finding is not supported by the record, as will be hereinafter pointed out) and that the petitioner made no affirmative showing that his rights were prejudiced.

The effect of the foregoing ruling is that petitioner was deprived of his constitutional right to a fair and impartial trial, but that such denial was harmless error. Those portions of the opinion which place the burden of showing prejudicial error on petitioner are as follows:

(R. 1263):

> "The contention that appellant would have thrown some light on the issues more favorable to himself if he had had the transcripts is entirely speculative. The evidence affords no ground for any such belief and there is no statement of fact throughout the briefs to justify an inference that such belief really exists."

And (R. 1266):

> "But in this case, where it is apparent that no essential ingredient of the offense was in any way dependent upon any matter contained in the transcripts and there is no reason to believe that any matter contained therein was competent, relevant or material matter of defense 'to order a new trial would be to violate the standards of Section 269 of the Judicial Code (U. S. C., Sec. 391), since the substantial rights of the defendant were not affected.' "

In this ruling and the construction placed on Section 269 of the Judicial Code the court below is in conflict with the decision of this Court in McCandless v. United States, 298 U. S. 342, where, in referring to this section of the Code, this Court states (l. c. 347):

> "That section simply requires that judgment on review shall be given after an examination of the entire record, 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. United States v. River Rouge

Co., 269 U. S. 411, 421, 70 L. Ed. 339, 346, 46 S. Ct. 144; Fillippon v. Algion Vein Slate Co., 250 U. S. 76, 82, 63 L. Ed. 853, 856, 39 S. Ct. 435; Williams v. Great Southern Lumber Co., 277 U. S. 19, 26, 72 L. Ed. 761, 767, 48 S. Ct. 417." (Italics by the Court.)

This Court put a like construction upon Section 269 of the Judicial Code in Williams v. Great Southern Lumber Co., 277 U. S. 19, 26, and United States v. River Rouge Co., 269 U. S. 411, 421. The rule thus enunciated by this Court has been followed by the Circuit Courts of Appeal in United States v. Dressler, 112 Fed. (2d) 972, 978 (C. C. A. 7th); Little v. United States, 73 Fed. (2d) 861, 866 (C. C. A. 10th), and Lynch v. Oregon Lumber Co., 108 Fed. (2d) 283, 285 (C. C. A. 9th).

The opinion below is contrary to and in conflict with all these cases.

POINT B.

[Specification of Error 1 (c).]

The opinion of the court below states (R. 1262):

> "The appellant had the right necessarily incident to fair trial to impeach the witnesses against him by compelling admissions from them on cross-examination, or, if they denied having given contradictory testimony, by producing impeaching witnesses. But the record discloses that the appellant was not limited in the exercise of this right. On the contrary, each of the witnesses was impeached. Each was cross-examined at length for appellant and it was brought out clearly as to the lawyer witnesses (for instance) that they had attempted to deceive the investigators and had stated that no return of part of their fees had been made to the company. Similarly the witnesses to the other false swearing were fully cross-examined and impeached by their own admissions."

And again it is stated (R. 1265):

> "Here appellant was accorded the right to and did

cross-examine at length and without any unreasonable limitation about what the impeached witnesses did or did not tell the investigators prior to the trial, both in colloquy and under oath."

The record does not support these statements.

The first of these witnesses to testify was B. P. Alschuler (R. 376). A striking example of how specific his cross-examination with respect to the prior contradictory testimony was, the position of the Government's attorney on the question and the trial court's ruling, appear in his cross-examination (R. 386, 387). Petitioner's counsel, making inquiry concerning this prior testimony, asked:

"Q. You told him that was not true, did you? A. Well, I don't remember the language.

Q. Sir? A. I don't remember the language.

Q. Well, can you give us substantially what you said when he inquired about that? A. Well, I cannot, because I don't remember. If he had asked the question one way, I might have said no, and if he had asked it another way, I might have said yes, but that is the substance of the answer, at least.

Mr. Leahy (addressing Mr. Blanton): Will you let me have a copy of that examination?

Mr. Blanton: On what basis are you asking for it, Mr. Leahy?"

Then follows (R. 387) a statement by petitioner's counsel that it was desired so that the jury might compare his original sworn testimony with his changed testimony at the trial, which went directly to the weight and credibility of his testimony, and also to show what promises of immunity may have been made before the testimony was changed. The Government's attorney then stated (R. 387):

"Mr. Blanton: He has admitted that he has changed his testimony. I think that concludes the matter.

The Court: Objection sustained.

Mr. Gallagher: Exception."

We will not burden this brief by setting forth all of the cross-examination on this point of those who were at all cross-examined as to their prior testimony, but merely direct the Court's attention to those places in the record where it may be found. The balance of this cross-examination of this witness appears (R. 389, 390) and was set forth in the petition for rehearing (R. 1283, 1284).

The second of these witnesses to testify was Rex H. Fowler (R. 396). His cross-examination on this matter appears (R. 398) and was quoted in the petition for rehearing (R. 1285).

Another was witness L. H. Keller (R. 533). His cross-examination on this point appears (R. 554) and is set forth in the petition for rehearing (R. 1289).

Another instance is that of witness Frederick J. Martin (R. 965). His cross-examination appears R. 966 and is quoted in the petition for rehearing R. 1288.

The cross-examination of witness Harry Williamson is found R. 464-467 and 907, 908, and was directed to the attention of the court below in the petition for rehearing R. 1285-1288.

The cross-examination of Eugene R. Kropp appears R. 758; that of George K. Miltenberger R. 568, 569; the cross-examination of E. B. Hamilton on this subject is found R. 491. The testimony of Albert C. Laun on this point under both direct and cross-examination appears R. 997, 998. Herman Spoehrer, who, next to Laun, was the Government's most important witness, denied that he had given different testimony when he testified before the Commission (R. 638).

An examination of this cross-examination of these witnesses discloses that there was no cross-examination as to the material details of the prior conflicting testimony, and,

of course, petitioner's counsel being deprived of an opportunity of examining a transcript of this prior testimony, were unable to formulate specific questions with respect thereto. The Court will note that in some instances the witnesses could not remember what they had previously testified to or their admissions were only partial and the answers sometimes indefinite. In most cases the cross-examination was limited to the mere admission that the witness had previously testified differently. Petitioner had a right to cross-examine these witnesses in detail as to what their prior testimony had been with respect to the material and relevant facts, so that the jury might weigh that testimony along with that given at the trial by these witnesses to determine the weight and credibility of their testimony. It was a matter for the jury to decide and not for the witness to state upon which occasion he had told the truth. If the transcript of the prior testimony of the witnesses had been available, they could be placed in a proper setting with respect to the circumstances under which their prior testimony branded as false was given. It would show whether or not prior to giving the testimony they had been warned of the penalty for false swearing. It would have disclosed what promises of immunity were made or what inducements were offered before they changed their testimony.

In holding that petitioner was not erroneously denied the right of cross-examination in this case the opinion of the Court below is in conflict with the decisions of this Court in Alford v. United States, 282 U. S. 687, and District of Columbia v. Clawans, 300 U. S. 617, in which cases this Court, in opinions by Mr. Justice Stone, now Chief Justice, held that the limitation of the right of cross-examination constituted reversible error. In the first cited cases this Court states (282 U. S., l. c. 691, 692):

"Cross-examination of a witness is a matter of right.

> * * * Its permissible purposes, among others, are * * * that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment * * *; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. * * * It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."

In the Clawans case this Court states, 300 U. S., l. c. 632:

> "Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, and of slight bearing on the bias and credibility of the witnesses, are not reversible errors. But the prevention, throughout the trial of a criminal case, of all inquiry in fields where cross-examination is appropriate, and particularly in circumstances where the excluded questions having a bearing on credibility and on the commission by the accused of the acts relied upon for conviction, passes the proper limits of discretion and is prejudicial error."

The court below in an earlier opinion, speaking through the then Senior Circuit Judge, Walter H. Sanborn, in the case of Heard v. United States, 255 Fed. 829, well states the rule of law as follows (l. c. 832):

> "But neither of these facts extracts the serious objection to the prohibition of the cross-examination of the witness as to his contradictory statements in detail of the facts and circumstances of the robbery or larceny. The government had called him as its chief witness, and relied upon him to establish its charge. By thus calling him it had vouched for the

truth of the story of the transaction to which he testified, and had subjected him to a fair and full cross-examination upon that subject. It was proper, relevant and material cross-examination to draw forth from the witness the fact that, when the transaction was recent and his recollection was fresh, he had told a different story, one so inconsistent with that to which he had testified that both stories could not be true. That was material cross-examination, because it at once challenged the credibility of his testimony, and the more in detail his first story was the more incredible it rendered his evidence. Neither a witness nor a party may lawfully escape such cross-examination by his mere testimony or admission that the witness has made statements inconsistent with his testimony at the trial and that they were false. Cross-examination may not be shut off in this way. The cross-examiner has the right to prove by his adversary's witness, if he can, what inconsistent statements he has made, not only in general, but in every material detail, for, the more specific and substantial the contradictory statements were, the less credible is the testimony of the witness. * * * A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error."

The same Court in Searway v. United States, 184 Fed. 716, held (l. c. 717):

"The rule is general and well settled that a categorical denial by a witness is not an essential preliminary to his impeachment. It is sufficient, his attention being properly directed, if there is forgetfulness, partial admission, or an uncertain, evasive, or indefinite answer. The important thing is the inconsistency in the statements as affecting the credit of the witness, and the preliminary inquiry is merely to give opportunity for explanation."

In Chicago, M. & St. P. Ry. Co. v. Harrelson, 14 Fed.

(2d) 893, 896 (C. C. A. 8), the Court held that the admission by a witness of self-contradiction in prior statements would not deprive the other party of the right to show the statement, because the admissions were not unambiguous and unequivocal.

In United States v. Graham, 102 Fed. (2d) 436 (C. C. A. 2nd), the Court, speaking of the right to bring out prior inconsistent testimony in cross-examination for purposes of impeachment, stated (l. c. 442):

> "No one could tell whether or not it was false without knowing what it was, and so the examination of this witness as to former testimony was properly allowed to proceed as it did."

For other cases treating of this same subject see Henderson v. United States, 20 Fed. (2d) 90 (C. C. A. 8th), and Tacoma Ry. & Power Co. v. Cothary, 235 Fed. 872 (C. C. A. 9th).

In the foregoing respects the decision of the court below is contrary to, and in conflict with, the cited decisions of this Court, those of other circuits, and its own prior decisions.

POINT C.

[Specification of Error 1 (d).]

The decision of the Court below places the burden upon petitioner to affirmatively show that the transcripts of the prior contradictory testimony of the witnesses contained relevant and material matter. The opinion states (R. 1263):

> "The contention that appellant would have thrown some light on the issues more favorable to himself if he had had the transcripts is entirely speculative."

And again (R. 1266):

> "There is no reason to believe that any matter con-

tained therein was competent, relevant or material matter of defense."

The incorrectness of these statements is conclusively shown by the mere fact that it was admitted by all of these witnesses, with one exception, that they had given testimony at the prior time which was different from that given at the trial and absolutely contrary thereto, and every one of these witnesses was a material witness who gave testimony bearing directly on the principal issues in the case. The unfairness of this ruling is apparent when consideration is given to the fact that petitioner had no opportunity to make a showing by reason of the trial court's refusal to order production of the transcript. However, this Court has held that the burden of making this showing is not upon the cross-examiner. See Alford v. United States, 282 U. S. 687. This Court in that case states (l. c. 692):

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. * * * It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the Court what facts a reasonable cross-examination might develop. * * * To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

In holding to the contrary the decision of the court below is in conflict with the opinion of this Court in the Alford case.

POINT D.

[Specification of Error 2.]

Petitioner requested the Court to charge the jury that an established reputation for good character standing alone might create a reasonable doubt, although without it the other evidence might be convincing, which was refused and exception saved (R. 1092). Petitioner then requested the Court to charge the jury that evidence of good character was in the same category as other evidence and must be considered and that it might of itself, if believed, create a reasonable doubt, where otherwise no reasonable doubt would exist. This was refused by the Court on the alleged reason that it was covered by the charge. Exception was saved to this ruling (R. 1093). The Court charged the jury (R. 1103) to the effect that reputation for good character was to be considered with the other facts and circumstances of the case; that the jury was warranted in considering such evidence whether the case was clear or doubtful for the purpose of raising and making out a reasonable doubt; that if, when considered with all the other evidence, it should raise a reasonable doubt, the defendant was entitled to an acquittal, but if all the evidence in the case, including that on good reputation, convinced the jury of guilt beyond a reasonable doubt, "then his previous good reputation cannot excuse, mitigate or palliate such guilt to any extent whatever." Exception was taken to this charge (R. 1107).

The question whether or not the accused in a criminal case is entitled to a charge that good reputation alone may raise a reasonable doubt, has led to much confusion in the decisions.

In Edington v. U. S., 164 U. S. 361, this Court held that it was reversible error to give a charge which permitted

consideration of evidence of good character only if the rest of the evidence created a doubt of guilt. This Court there stated (l. c. 366):

> "Whatever may have been said in some of the earlier cases, to the effect that evidence of good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing."

We find no later case in which this Court has passed on this question.

An examination of the charge given in this case (R. 1103) shows that the Court did not include therein a statement that this evidence alone might raise a reasonable doubt.

The Court of Appeals of the District of Columbia has held that the refusal of a charge such as was requested here and the giving of a charge very similar to the one here given, constituted reversible error; that under the authority of the Edington case a defendant was entitled to an instruction that evidence of good reputation alone would raise a reasonable doubt.

Egan v. United States, 287 Fed. 958, 968.

This was again held by the same Court in Jones v. United States, 289 Fed. 536, 538.

That Court again recognized this as the correct rule in Kinard v. United States, 96 Fed. (2d) 522, 523.

The Seventh Circuit, in the case of Snitkin v. United

States, 265 Fed. 489, 491, held, upon the authority of the Edington case, that it was error to refuse to charge the jury that reputation of good character alone might raise a reasonable doubt.

The Tenth Circuit, in Miller v. United States, 120 Fed. (2d) 968, 971, adheres to the view that, under the authority of this Court's decision in the Edington case, the defendant is entitled to have the jury charged that good character evidence alone may create a reasonable doubt, although without it the other evidence would be convincing.

The Eighth Circuit, to which the petition for certiorari in this case is directed, seems to have held both ways, although the great majority of its decisions are to the effect that a defendant is not entitled to an instruction on the effect of reputation for good character which permits such evidence standing alone to raise a reasonable doubt. We cite those cases supporting our contention. Thus, in Perara v. United States, 235 Fed. 515, 517 (C. C. A. 8th), that Court quoted with approval that portion of a given charge which permitted a reasonable doubt justifying an acquittal to be based upon evidence of good character alone. The case was reversed because the Court found that the balance of the charge destroyed the effect of such evidence, the Court stating (l. c. 517):

> "By direct statement, innuendo and suggestion it, in effect, nullified the true rule as first stated, and made good reputation of doubtful value and probably a positive disadvantage to the defendant."

In Searway v. United States, 184 Fed. 716 (C. C. A. 8th) the Court refused a request to charge the jury that evidence of good character might of itself create a reasonable doubt, though without it no such doubt would exist, that such evidence was to be considered with all the other facts and circumstances of the case. Instead, the Court

charged that he could not be acquitted on that ground if the jury found from the other evidence in the case that he was guilty beyond a reasonable doubt. The Court held this to be reversible error.

In Estabrook v. United States, 28 Fed. (2d) 150 (C. C. A. 8th), the same Court held that an instruction to acquit if, after considering all of the testimony including that bearing on good reputation, the jury had a reasonable doubt of guilt, did not require reversal because of the Court's failure to charge that defendant's good reputation alone might engender a reasonable doubt requiring acquittal, because there was no exception to the instruction given nor a request for an instruction covering the omission. In that opinion the Circuit Court of Appeals for the Eighth Circuit stated (l. c. 154):

> "This circuit has repeatedly held that a defendant's good reputation may alone engender in the minds of the jurors such a reasonable doubt as to entitle him to an acquittal. Sunderland v. United States (C. C. A.), 19 Fed. (2d) 202. Of course, it may also create a doubt when considered in connection with the other evidence in the case, as the court charged. Of this we may say as we said of the instruction on circumstantial evidence, no request was made that the Court additionally charge the jury that good reputation alone might raise a reasonable doubt. Indeed, no exception or reference of any kind was made by defendant's counsel to this instruction."

In the case now at bar, a request for instructions embodying the rule here contended for were specifically requested and refused and exception saved and the Court's given charge permitted it to raise a reasonable doubt only when considered with the other evidence in the case. To thus limit its purpose is, as was said by the Court of Appeals of the District of Columbia in the Egan case, supra, quot-

ing from opinions of the Supreme Courts of California and Utah (People v. Bell, 49 Cal. 485; State v. Brown, 39 Utah 140), "not telling them anything beyond letting in the evidence." Also the concluding paragraph of this portion of the charge (R. 1103), "but if all the evidence in the case, including that which has been given on the matter of good reputation, convinces you of his guilt beyond a reasonable doubt, then his previous good reputation cannot excuse, mitigate or palliate such guilt to any extent whatever," nullifies any benefit which the petitioner might have received from this evidence.

Thus, it will be seen that on this point there is a conflict between the Circuits and, to some extent at least, within the Eighth Circuit itself, and we respectfully suggest that the decision here is in conflict with the opinion of this Court in the Edington case, and that this Court should accept jurisdiction and determine the matter.

POINT E.

[Specification of Error 3.]

The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony upon which the perjury charge is based. This must be shown by two witnesses or by one witness with circumstances of satisfactory corroboration. The Court recognized this rule in its charge (R. 1099, 1104). Petitioner requested a charge (R. 1093) which stated this rule, and, in addition, contained the following:

> "Circumstantial evidence of itself or corroborative evidence of itself is not sufficient to support a charge of perjury."

This was refused and exception saved. This latter portion of the refused charge was, of course, equally correct,

as circumstantial evidence alone cannot support a charge of perjury.

Clayton v. United States, 284 Fed. 537, 539 (C. C. A. 4th);
United States v. Otto, 54 Fed. (2d) 277, 279 (C. C. A. 2nd);
Phair v. United States, 60 Fed. (2d) 953, 954 (C. C. A. 3rd).

The Court in its charge, however, also instructed the jury as follows (R. 1102):

> "I need scarcely tell you that proof of a crime may be either by direct or circumstantial evidence. Either is sufficient."

Then follows an explanation of what constitutes direct evidence and what constitutes circumstantial evidence. This paragraph of the charge then concludes (R. 1103):

> "These circumstances, I charge you, ought to be consistent with each other and consistent with the guilt of the defendant, and inconsistent with reasonable hypothesis of the defendant's innocence."

The refusal of petitioners' charge that circumstantial or corroborative evidence is insufficient to support a charge of perjury was error, and doubly so when the Court expressly charged directly to the contrary.

On appeal complaint was made of this action by the trial court. The opinion of the Circuit Court of Appeals holds that this was not error because the jury was fully informed of the exception applicable to a perjury case. The opinion states (R. 1270):

> "It appears that in the part of the court's general instructions relating to the kind of proof by which commission of a crime may be made, the court declared the general rule that it may be by direct or circumstantial evidence, either of which is sufficient, and the two kinds of evidence were described. That

> the general law was correctly stated is not questioned and it is clear from the instructions given that the jury was fully informed of the special exception applicable to the perjury charge. We find no error in giving or refusing instructions concerning the quantum of evidence upon the perjury charge."

In so holding, the decision is in conflict with that of this Court in Mills v. United States, 164 U. S. 644, 646, which holds that an incorrect portion of a charge cannot be held to be harmless even though it be urged that in other portions of the charge the correct rule was stated.

It is also contrary to and in conflict with the Circuit Court of Appeals for the Third Circuit in Nicola v. United States, 72 Fed. (2d) 780, where it is stated:

> "Where two instructions are given to the jury, one erroneous and prejudicial, and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn."

The Court cites in support of this statement, among other authorities, this Court in Mills v. United States, supra. In this respect the opinion is also contrary to and in conflict with the Circuit Court of Appeals for the Ninth Circuit in De Groot v. United States, 78 Fed. (2d) 244, 248, 253, which holds that an erroneous portion of a charge is not cured by stating the correct rule in other portions of the charge.

POINT F.

[Specification of Error 4.]

After the case had been under consideration by the jury for twenty-six hours without an agreement a supplemental charge was given by the Court (R. 1109-1111). Thereupon the jury retired for further deliberation (R. 1113) and in

thirty-seven minutes returned a verdict of guilty on the fourth and fifth counts of the indictment and not guilty on the first, second and third counts (R. 1114). Counsel for petitioner made strenuous objection to this charge and took exception thereto on the ground that it was coercive (R. 1111). Complaint was made on appeal, but the opinion below sustains the charge (R. 1275, 1276). It will be noted from reading this instruction that it stresses the fact that the trial had been long and expensive and that failure to reach a verdict would necessitate another expensive trial. It repeatedly emphasized the fact that a verdict should be returned and contained repeated admonitions with reference to the duty of the jurors to accord deference to each other's opinions and charged them that they should come to an agreement at least upon some of the counts, and informed the jurors that by adopting the suggestions contained in this instruction they would inevitably come to an agreement. Six times the Court in this charge emphasizes that a verdict should be returned:

1. "It is, therefore, very desirable that you should agree upon a verdict" (R. 1109).

2. "It is your duty to decide the case if you can conscientiously do so" (R. 1110).

3. "I can only say to you that the purpose of a trial is to arrive at a verdict, a just verdict, not a disagreement" (R. 1111).

4. "It is the duty of a jury to agree upon a verdict, and that is the purpose of a trial" (R. 1111).

5. "I think you ought to make every honest effort to come to an agreement at least upon some of the counts, one or more" (R. 1111).

6. "It is your duty to adjust your differences of opinion, if any, * * * such a method adopted by reasonable men having due regard to the opinions of your fellow jurymen will almost inevitably lead to an agreement and a just verdict" (R. 1111).

The jury was three times impressed with the fact that a disagreement would necessitate another trial:

1. "Your failure to agree upon a verdict will necessitate another trial equally as expensive" (R. 1109).

2. "You should consider that the case must at some time be decided" (R. 1110).

3. "There is no reason to believe that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other" (R. 1110).

Five times is repeated an admonition with respect to their duty to accord deference to each other's opinions and in two of these instances the language is identical. These portions of the charge are as follows:

1. "You must examine the question submitted to you with candor and with a proper regard and deference to the opinions of each other" (R. 1110).

2. "You must examine the question submitted to you with candor and with a proper regard and deference to the opinions of each other" (R. 1111).

3. "You ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments" (R. 1110).

4. "It is your duty to adjust your differences of opinion, if any, by a comparison of views and by a discussion of the evidence, having your minds at all times open to the truth as may be impressed upon you by fair argument" (R. 1111).

5. "A dogged persistence not to listen to a fair discussion of the evidence or listen to fair argument, or listen to persuasive evidence or reason, is destructive of justice" (R. 1111).

This charge did not in any respect tend to assist the jury in its deliberations, but served only to force a verdict by coercion. Unquestionably, after twenty-six hours de-

liberation, some members of the jury, as stated by petitioner's counsel in their objections to the charge, had a reasonable doubt and this coercive charge would cause them to waive this doubt in favor of the opinion of the majority. The succeeding event proved the fact, as a verdict was obtained in thirty-seven minutes after giving this charge. And it is worthy of note in this connection that petitioner was acquitted on three counts of the indictment and convicted on two, where there was little, if any, difference in the proof adduced in support thereof.

The conclusion in the opinion below (R. 1276) that ability and energy of counsel tended to obscure the obvious and that, as the Judge said nothing to tilt the scale in the jury's hands, it could not be said that a verdict was improperly coerced, is to beg the question. There can be but one conclusion under the circumstances here existing with respect to whether or not the supplemental charge coerced a verdict. It unquestionably did, and even though the court below states that there was little room for reasonable doubt (R. 1275) the fact is beyond argument that twelve men had considerable doubt when they failed to reach a verdict in twenty-six hours. Whether or not the court below felt that the evidence was such as to leave little doubt in the Court's mind, nevertheless petitioner was and is entitled to his constitutional right of a fair trial.

In the situation presented the language of this Court in Burton v. United States, 196 U. S. 283, is most pertinent. In that case the jury, after having deliberated for more than thirty-six hours without reaching an agreement, were called into court and inquiry made as to how they stood and a further charge was given. This Court there said (l. c. 306, 307):

> "Here was a case of very great doubt in the minds of some of the jury. It had deliberated for more than

> 36 hours and had been unable to agree upon a verdict. * * * Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. * * * A slight thing may have turned the balance against the accused under the circumstances shown by the record."

The opinion states (R. 1275) that this charge was substantially the same as that approved by this Court in Allen v. United States, 164 U. S. 492, 501, and that given in United States v. Allis, 73 Fed. 165, 182, affirmed by this Court, 155 U. S. 117. As a matter of fact this instruction was obtained by taking the charge given in Commonwealth v. Tuey, 8 Cush. 1 (Mass.); also in the Allen case by this Court, supra, the Allis case given on the Circuit (73 F. 165, 182); United States v. Commerford, 64 Fed. (2d) 28, 31 (C. C. A. 2nd), and Shaffman v. United States, 289 Fed. 370, 374 (C. C. A. 3rd). Everything deemed of assistance to the Government in the charge in each of those cases was taken and combined into one charge, which is the one here given. This no doubt accounts for the many repetitions in the instruction. It is not correct to say, as the court below did, that this is substantially the charge in the Allen case, as a reference to that case, 164 U. S., l. c. 501, will show. That charge did not repeatedly emphasize the importance of returning a verdict or repeatedly admonish the jurors of their duty to acquiesce in the conclusion of the majority. Neither is it correct that this Court approved the instruction given in United States v. Allis, 73 Fed. 165, 182, although courts of appeal of the various circuits have not infrequently so stated. A reading of this Court's opinion in the Allis case, 155 U. S. 117, 120, 121, leaves considerable doubt that the supplemental charge appearing at 73 Fed. 182 was in its entirety con-

tained in the record before this Court. It certainly does not appear in this Court's opinion, at pages 120, 121 of that case, where a summary of the charge is given, and this Court specifically states (l. c. 121) that the quoted portions of the charge were the only portions contained in the record. In any event, this Court specifically refused to pass upon the alleged error that the court below gave a coercive charge for the reason that no objection or exception on that ground was taken in the trial court.

The opinion below also cites in support of its ruling sustaining this instruction Nigro v. United States, 4 Fed. (2d) 781, 785 (C. C. A. 8th), and Stewart v. United States, 300 Fed. 769, 785 (C. C. A. 8th). In both these cases, however, the same Court held the giving of supplemental charges not as strong as the one here in question to constitute error. The same Court condemned instructions of this nature in Edwards v. United States, 7 Fed. (2d) 598, 602; C. & E. I. Ry. Co. v. Sellars, 5 Fed. (2d) 31, 32 (C. C. A. 8th), and Gideon v. United States, 52 Fed. (2d) 427, 431 (C. C. A. 8th); and the Ninth Circuit condemned a supplemental instruction in Peterson v. United States, 213 Fed. 920, 924.

It is respectfully suggested that the opinion of the court below in approving this instruction has so far departed from the accepted and usual course of judicial proceedings and sanctioned such departure by the lower court as to call for an exercise of this Court's power of supervision.

CONCLUSION.

It is respectfully submitted that petitioner was denied a fair trial in this case; that it is one calling for the exercise by this Court of its supervisory powers, in order that the conflicts between the decision of the court below and those of other circuits, and this Court, be determined,

and so that petitioner may be accorded the fair and impartial trial to which he is entitled under the Constitution, for, as this Court has recently stated, "free speech and fair trials are two of the most cherished policies of our civilization" (Bridges v. State of California; The Times Mirror Co. et al. v. The Superior Court of California, Nos. 1 and 3, October Term, 1941). That to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Eighth Circuit and reverse it.

JOHN S. LEAHY,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 810

FRANK J. BOEHM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1239–1277) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 1277–1278) was entered November 6, 1941, and a petition for rehearing was denied November 26, 1941 (R. 1313). The petition for writ of certiorari was filed December 22, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the

Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

STATUTE INVOLVED

Section 125 of the Criminal Code, 18 U. S. C., Sec. 231, provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in refusing petitioner's demand for the transcripts of prior testimony given by the Government's witnesses before the Securities and Exchange Commission which was admittedly contrary to their testimony at the trial.

2. Whether it was error to refuse petitioner's requested instruction that the evidence of his good reputation "standing alone may create a reasonable doubt, although without it the other evidence may be convincing."

3. Whether the trial court correctly charged the jury with respect to the necessary quantum of evidence in perjury cases.

4. Whether the trial judge, in his supplemental charge given to the jury after it had deliberated for twenty-six hours, coerced the jurors to agree upon a verdict.

STATEMENT

On March 13, 1940, petitioner was indicted for perjury in violation of Section 125 of the Criminal Code (R. 8–23). The indictment was in five counts, but petitioner was convicted only upon counts 4 and 5 (R. 15–22, 1114–1115), which charged him with falsely testifying before an examiner of the Securities and Exchange Commission in the course of an investigation conducted by the Commission into activities and affairs of the Union Electric Company, hereinafter called the company. One of the purposes of the investigation was to determine whether there had been a violation of Section 12 (h) of the Public Utility Holding Company Act of 1935, which prohibits "a registered holding company or any subsidiary" from making political contributions.

More particularly, counts 4 and 5 of the indictment alleged that petitioner, who was executive vice president and director of the company, swore falsely when he testified (1) that "he did not pad his own expense accounts"; (2) that he had taken "all of the trips that were listed on his expense

vouchers"; (3) that the company never maintained a cash fund for political purposes and "any cash in his office or on his person, or in his safe was his personal fund"; (4) that neither the company nor its officers obtained any money "by means of kick-backs or rebates from attorneys" retained by it (R. 19); (5) that the company obtained no money by kick-backs or rebates from supply companies or in any other "off the record" manner; (6) that he "never made any political contributions or loans or contributions to any candidate for public office for and on behalf of" the company; and (7) that "he had never made a political contribution in an amount in excess of $100" (R. 21).

Petitioner was sentenced to five years' imprisonment on each count, the sentences to run concurrently, and fined $4,000 (R. 1118–1119). The judgment of conviction was affirmed by the Circuit Court of Appeals for the Eighth Circuit (R. 1239–1277).

Petitioner does not question the sufficiency of the evidence which, the Circuit Court of Appeals said, "must convince beyond reasonable doubt, that the [petitioner] committed the perjuries charged against him as found by the jury * * *" (R. 1261). The evidence is summarized merely for the purpose of showing the background against which petitioner's contentions must be measured.

Rebates or kick-backs by attorneys.—Petitioner had testified before the examiner that no money was received by the company or its officers through rebates or kick-backs from attorneys retained by it (R. 359–363). By uncontradicted evidence at the trial, however, it was shown that at petitioner's instance at least four attorneys retained by the company systematically rebated or kicked back over a period of about nine years one-half or more of their annual retainers in a total amount of at least $360,000.

Thus, B. P. Alschuler of Aurora, Illinois, who was retained at $38,000 per annum, testified that he returned to petitioner or, in rare instances, one of his subordinates, in places like interurban stations (R. 380), approximately $19,000 per annum for six years (R. 379–381, Ex. U. S. 69–88B; R. 401–446). E. Bentley Hamilton of Peoria, Illinois, who received $40,000 per annum (Ex. U. S. 93, 93–00; R. 493–500) rebated to petitioner, in cash, about $20,000 a year from about 1930 up to the early part of 1939 (R. 475–479). Similarly, Rex Fowler, Des Moines, Iowa, received an average retainer of $12,000 per annum from 1932 through 1938 (Ex. U. S. 90–92D; R. 447–451), from which he rebated about $6,000 annually (R. 396–397, 451). Fowler usually gave cash to Laun or Williamson, petitioner's subordinates (R. 397), who, in turn, delivered it to petitioner (R. 459–462, 975–976). A somewhat different practice was

followed with Guy C. McMillan of St. Louis, Missouri (R. 501). One Jimmie Miller, a St. Louis political ward boss, approached Laun around 1933 and requested a "salary" of $100 a month for exerting his political influence on behalf of the company (R. 972). Miller received this "salary" in cash provided by McMillan, who was employed by the company as a collection attorney and who, it was arranged, should receive a special monthly "retainer" of $100 (R. 972–974). At Laun's direction McMillan returned this retainer in cash to Laun, who in turn passed it on in cash to Miller (R. 502–505, 972–974). About 1935 the amount was increased to $200 a month and this practice continued through 1937 (R. 503).

Rebates or kick-backs by concerns supplying materials or services to the company.—At the Securities and Exchange Commission hearing, petitioner denied that the company obtained any money through rebates or kick-backs from persons or concerns supplying it with materials or services, or in any other off the record manner (R. 363). It was shown at the trial, however, that at least $160,000 in cash, all of which passed through petitioner's hands, was realized in this way.

In about 1930 it was necessary for the company to purchase a large supply of insulators (R. 534). Several companies submitted substantially similar bids (R. 534). One of these was

submitted by Lapp Insulator Company through L. H. Keller. Together with petitioner, George K. Miltenberger, petitioner's subordinate and a friend of Keller, consummated an arrangement with Keller whereby the Lapp Company received the contract and agreed to and did rebate 10% of the contract price to petitioner (R. 534–536, 538–539). A similar plan was later devised whereby Keller supplied the company with poles, rebating to petitioner or Miltenberger 10% of the purchase price (R. 539–551, 568).[1] These rebates continued through 1937 (R. 547).

Again, at petitioner's instigation, an arrangement was made with the company's insurance brokers whereby, commencing in 1931, the brokers would pay over to petitioner large amounts of cash under the guise of credits due on fictitious survey charges, favorable risk credits, savings effected by purchasing long-term contracts and savings occasioned by securing special discounts on fleet contracts (R. 623–624, 648, 649, 576, 580, 581–586, 608–613; Ex. U. S. 124, 124A, 124B; R. 622; Ex. U. S. 128B).

Padding of petitioner's expense accounts.—Petitioner had testified before the examiner that none of the expense accounts which he submitted to the company were at any time padded and that he

[1] A large number of bank statements, drafts, and checks used by Keller, evidencing these rebates, were introduced in evidence (Ex. U. S. 67–68A, 101–102E, 103, 107; R. 533–560).

took all the trips listed thereon (R. 355–357). It was shown at the trial, however, that it was petitioner's practice to submit monthly expense accounts covering alleged trips to New York and Washington, including entertainment and miscellaneous expenses incurred on behalf of the company (Ex. U. S. 139, R. 863; Ex. U. S. 139A, R. 837; Ex. U. S. 139B, R. 761)[2] when in fact petitioner was in St. Louis and other places in Missouri.[3]

Slush fund and political contributions.—In his testimony before the Commission, petitioner denied that the company ever maintained a fund for political purposes and asserted that all cash in his office and safe and on his person was his own (R. 357–358). The manner in which petitioner received funds as rebates on attorneys' fees, kick-backs on equipment and insurance contracts and by padding his own expense accounts has already been shown. Substantial sums were

[2] In about 1935 the company's system of accounts was changed and the expense accounts were no longer submitted in detail (R. 937). This, of course, made it virtually impossible to establish, except by oral admission, the fictitious character of such accounts after that date.

[3] See Ex. U. S. 139A, R. 837; U. S. Ex. 167–168B, R. 839–845, 995; Ex. U. S. 139, R. 863; Ex. U. S. 169–169B, 156–156D, 170–170F, 159–159E, 171–171B, 171–172–172F, R. 865, 871, 877, 883, 889, 894; Ex. U. S. 139B, R. 761; Ex. U. S. 161–161J, 162–163J, 160–160B, 152, 157–157B, 158–158C, 157C, 164–164F, 165–165D, R. 767, 768, 771, 776–784, 787, 792–795, 796–801.

also realized by similar padding of the expense accounts of other officers of the company.[4]

It is apparent from the undisputed evidence, therefore, that petitioner collected a cash fund of at least $580,000.[5]

Despite petitioner's denial before the examiner that any political contributions or loans were ever made to candidates for public office or public officials on behalf of the company, and that he ever made any political contributions exceeding $100, the evidence shows that petitioner disbursed at least $62,365 to candidates and office holders. These contributions, which were always made in cash by petitioner or his subordinates and not dis-

[4] The following officers and employees of the company testified that they rebated to petitioner, from funds paid them pursuant to expense vouchers, the approximate amounts set opposite their names:

George K. Miltenberger	$7,000	(R. 803–806)
Shurly R. Irish	6,725	(R. 823–826)
William Avery	2,000	(R. 809–810)
E. J. Emberson	4,000	(R. 815–818)
Herman Spoehrer and Eugene Kropp	8,200	(R. 675, 688, 692–698)
Harry Williamson	21,000	(R. 899–907)
Vernon Flynn	4,828	(R. 909–910)
George Welsh & George May	1,140	(R. 917–932)
	54,893	

[5] This was derived from the following sources: E. Bentley Hamilton contributed about $190,000 (R. 500); B. P. Alschuler contributed about $123,000 (R. 450); Rex Fowler contributed about $44,250 (R. 450); Guy C. McMillan contributed about $72,000 (R. 511); L. H. Keller contributed about $72,000 (R. 574–576); Herman Spoehrer, from the insurance account, contributed over $90,000 (R. 648–649); persons other than petitioner who padded expense accounts contributed over $54,000.

closed on company records (R. 971–997), went to a wide variety of persons in Missouri and Illinois, including candidates for Congress (R. 725, 944, 945, 989), Governor (R. 939–941, 958, 962, 986–987, 988, 454–457, 918–919, 955–956, 991, 1002), Lieutenant Governor (R. 992), State Supreme Court Justice (R. 942, 988), State Auditor (R. 748–750, 987), State Senate (R. 935–936, 987, 992–994), State House of Representatives (R. 750–753, 946, 947, 952–953, 962–963, 989–994), and to County Judges (R. 943–944, 989), Prosecuting Attorneys (R. 1000–1001), Sheriffs (R. 1001), Engineers (R. 993), Collectors (R. 994), Mayors (R. 964, 965, 1003), Commissioners (R. 919, 933), and Aldermen (R. 927), as well as political bosses (R. 933–935, 920–922, 972–974, 996, 997).

Petitioner's defense.—Petitioner did not testify on his own behalf, and relied chiefly upon the testimony of a number of witnesses who testified as to his prior good reputation (R. 1040, 1054, 1055, 1057–1061, 1066).

It was shown, however, that petitioner had admitted to three witnesses for the Government (R. 641, 1004, 1005) that "being in the position of not being able to make proper deductions from his personal income tax returns for illicit expenditures" he was "in a terrific spot" and hence in testifying before the Commission "as the lesser of two evils, he choose the perjury route" (R. 1007).

ARGUMENT

I

Petitioner complains (Pet. 26–34) that he was unable adequately to cross-examine Government witnesses because he was not permitted to inspect transcripts of testimony previously given by them before the Securities and Exchange Commission. However, as the court below held (R. 1262–1263), the record discloses that no limitation was placed upon petitioner's cross-examination of these witnesses,[6] all of whom admitted that their testimony was inconsistent with that which they had theretofore given at the Commission's investigation (R. 464–473, 568–569, 758, 808–809, 814, 821–822, 833, 907–908, 965–968). In most instances they were employees of the company and subordinates of petitioner, or attorneys who had been employed at his direction (R. 377–386, 398, 399, 488–491). Almost without exception, they stated that they had perjured themselves at the instance and request of petitioner (R. 658–659, 817, 965–968), and made a practice of advising petitioner of their perjury (R. 382–392, 568–569, 808–809, 965–968). Consequently, petitioner's claim that he was prejudiced in his cross-examination of these witnesses because he was ignorant of "the material details of the prior conflicting testimony" (Pet. 30–31) is palpably frivolous.

[6] In some instances (e. g. R. 738–739) petitioner's various counsel cross-examined witnesses in relays.

Moreover, even if the petitioner had not known of the witnesses' prior perjurious testimony, it is settled that once a witness admits prior contradictory statements, it is unnecessary to burden the record with additional proof thereof. *Crowley* v. *Page*, 7 Car. & Payne 789; *State* v. *Cooper*, 83 Mo. 698; *Swift & Co.* v. *Madden*, 165 Ill. 41; *Lightfood* v. *People*, 16 Mich. 507; Wharton, *Criminal Evidence* (10th ed. 1912) sec. 483; Jones, *Evidence* (4th ed. 1938) sec. 849; draft of *Uniform Evidence Act*, sec. 21.[7]

Furthermore, as stated by the Circuit Court of Appeals, petitioner was "clearly not entitled" (R. 1265) to demand a transcript of all the testimony of all the witnesses. The transcripts of the evidence taken before the examiners embodied results of the investigative activities of the Commission, and to permit petitioner to examine the entire transcripts would not only have revealed the Government's case against him before it was presented to the jury, but would have advised other possible defendants that they were under suspi-

[7] *Heard* v. *United States*, 255 Fed. 829 (C. C. A. 8), cited by petitioner (Pet. 32–33) is not in point, for, as was said by the court below (R. 1265), which decided that case, petitioner in the present case "was accorded the right to and did cross-examine at length and without any unreasonable limitation about what the impeached witnesses did or did not tell the investigators prior to the trial, both in colloquy and under oath."

cion.[8] It might also have exposed innocent persons who would be cleared of complicity through further investigation. Cf. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 234; *In re Securities and Exchange Commission*, 84 F. (2d) 316 (C. C. A. 2), reversed as moot, 299 U. S. 504; *Woolley* v. *United States*, 97 F. (2d) 258 (C. C. A. 9), certiorari denied 305 U. S. 614.

Finally, in view of the overwhelming evidence of petitioner's guilt, the denial of his request to examine the transcripts, even if erroneous, would not warrant a reversal of his conviction. *United States* v. *Trenton Potteries*, 273 U. S. 392, 404; *United States* v. *Socony Vacuum Oil Co., supra*, at p. 231. As the court below pointed out (R. 1261), "consideration of the testimony, oral or documentary, must convince beyond a reasonable doubt that [petitioner] committed the perjuries charged against him as found by the jury, and [his briefs] * * * contain no intimation to the contrary."

II

The holding of the Circuit Court of Appeals (R. 1274–1275) that it was not error to refuse

[8] Two other prosecutions arising out of the same proceedings have been instituted. *United States* v. *Illinois-Iowa Power Co. et al.* (S. D. Ill.); *United States* v. *Union Electric Co. et al.*, (E. D. Mo.). In the *Illinois-Iowa* case, the corporate defendant pleaded *nolo contendere* and was fined $5,000, whereupon the Government entered pleas of *nolle prosequi* as to the individual defendants. The *Union Electric Co.* case is now on trial.

petitioner's requested instruction that the evidence of his good reputation (R. 1040, 1054, 1055, 1057–1061, 1066) was alone sufficient to create a reasonable doubt, is plainly correct and does not present any conflict of decisions warranting certiorari.

The trial court charged the jury that if the character testimony engendered a reasonable doubt, when considered with the other facts and circumstances of the case, petitioner was entitled to an acquittal; but, if all the evidence, including the character evidence, convinced the jury of his guilt beyond a reasonable doubt, his previous good reputation in no way served to "mitigate or palliate" his guilt (R. 1103). This instruction correctly stated the law and was all that petitioner was entitled to ask.

Petitioner's argument that *Edgington* v. *United States,* 164 U. S. 361; *Egan* v. *United States,* 287 Fed. 958 (App. D. C.) and *Snitkin* v. *United States,* 265 Fed. 489, 491–492 (C. C. A. 7)[9] required that

[9] Contrary to petitioner's assertion (Pet. 37–38), it seems clear that the opinion below is not in conflict with the prevailing rule in the Seventh Circuit. See *Allen* v. *United States,* 4 F. (2d) 688, 694–695 (C. C. A. 7); *Haffa* v. *United States,* 36 F. (2d) 1, 5 (C. C. A. 7) certiorari denied, 281 U. S. 727.

Miller v. *United States,* 120 F. (2d) 968 (C. C. A. 10) cited by petitioner (Pet. 38) as being in conflict with the opinion below, is not in point. The court there was dealing with an instruction which "limited the consideration of the character testimony to a determination whether the prose-

his requested instruction be given, has been twice rejected in decisions which this Court refused to review. *Kreiner* v. *United States,* 11 F. (2d) 722, 726 (C. C. A. 2), certiorari denied 271 U. S. 688; *Haffa* v. *United States,* 36 F. (2d) 1, 5 (C. C. A. 7), certiorari denied 281 U. S. 727. As we said in our Brief in Opposition in the *Haffa case, supra,* the statement in the *Edgington* decision (p. 366) that character evidence may alone create a reasonable doubt was not the announcement of "a rule of law" but a "statement of what may result in some cases from the application of the correct rule"[10] and the *Egan* and *Snitkin* cases "misinterpreted and misapplied the holding of the

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cuting witnesses committed perjury or were mistaken." 120 F. (2d) at 972. The Tenth Circuit is definitely committed to the validity of an instruction of the type given in this case. *Arnold* v. *United States*, 94 F. (2d) 499, 502–503 (C. C. A. 10); *Hancey* v. *United States*, 108 F. (2d) 835, 837 (C. C. A. 10).

[10] This interpretation of the *Edgington case* is uniformly accepted in all jurisdictions where the question has arisen except in the District of Columbia. *LeMore* v. *United States*, 253 Fed. 887, 894 (C. C. A. 5), certiorari denied, 248 U. S. 586; *Kaufmann* v. *United States*, 282 Fed. 776, 785 (C. C. A. 3), certiorari denied, 260 U. S. 735; *Grace* v. *United States*, 4 F. (2d) 658, 662 (C. C. A. 5); *Allen* v. *United States*, 4 F. (2d) 688, 695 (C. C. A. 7); *Searway* v. *United States*, 184 Fed. 716, 717 (C. C. A. 8); *Winter* v. *United States*, 13 F. (2d) 53, 59 (C. C. A. 8); *Linde* v. *United States*, 13 F. (2d) 59, 61–62 (C. C. A. 8); *Mansfield* v. *United States*, 76 F. (2d) 224, 230 (C. C. A. 8), certiorari denied, 296 U. S. 601.

Edgington case." (No. 587, October Term, 1929, pp. 9, 11–12).

III

Petitioner contends (Pet. 17, 40–42) that the trial court's refusal to charge that circumstantial or corrobrative evidence "of itself is not sufficient to support a charge of perjury" (R. 1093) negatived the requirement that the uncorroborated testimony of one witness is insufficient (R. 1099, 1104). But petitioner does not point to a single instance in which the proof of the perjurious statements alleged in the indictment rests on circumstantial or uncorroborated testimony.

As we have shown, the falsity of each statement was unequivocally proved by the direct testimony of two or more witnesses with the exception of petitioner's denial that he padded his own expense accounts. The falsity of this statement, however, was established by various letters, memoranda, vouchers, and other documents written and signed by petitioner in St. Louis on occasions when, according to his expense statements, he was elsewhere.[11] As early as *United States* v. *Wood*, 14 Pet. 430, this Court recognized that documents of

[11] Exs. U. S. 169–169B, 156–156D, 170–170F, 159–159E, 171–171B, 172–172F; R. 865, 871, 877, 883, 889, 894; Exs. U. S. 161–161J, 162, 163–163J, 160–160B, 152, 157–157B, 158–158C, 157C, 164–164F, 165–165D; R. 767, 771, 776–784, 787, 792–795, 796–801.

this character may constitute sufficient evidence of the perjurious character of the testimony attacked.[12] Moreover, apart from the documentary proof, the witness Laun testified that he saw petitioner in Missouri at times when, according to the expense account submitted by him, he was in New York (R. 995). This is corroborated by the airplane log of the company (Exs. U. S. 167–168B, R. 839–845).

In any event, there were four specifications of perjury in the fourth count, only two of which pertained to the padding of petitioner's own expense accounts (R. 15–20)[13] and it is well established that "all the several particulars, in which the prisoner swore falsely, may be embraced in one count, and proof of the falsity of any one will sustain the count." Wharton, *Criminal Law*, 12th ed., Vol. 2, sec. 1567; *United States* v. *Masciuch*, 111 F. (2d) 602, 603 (C. C. A. 2), certiorari denied 311 U. S. 650.

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[12] See also *Hammer* v. *United States*, 271 U. S. 620; *Warszower* v. *United States*, 312 U. S. 342. Cf. *Gordon* v. *United States*, 5 F. (2d) 943–945 (C. C. A. 8); *Behrle* v. *United States*, 100 F. (2d) 714, 715 (App. D. C.); *Schonfeld* v. *United States*, 277 Fed. 934, 939 (C. C. A. 2), certiorari denied 258 U. S. 623; *Phair* v. *United States*, 60 F. (2d) 953–954 (C. C. A. 3); *State* v. *Storey*, 148 Minn. 398, 182 N. W. 613.

[13] The fifth count contained no allegation with reference to the padding of petitioner's expense accounts (R. 20–22).

IV

Petitioner urges (Pet. 42–47) that the supplemental instructions given the jury (R. 1109–1111) after they had deliberated some twenty-six hours (R. 1109), were coercive and deprived him of his right to a fair trial.[11]

Despite petitioner's assertion to the contrary (Pet. 46), the supplemental charge is, in terms, without material variation from that given in *United States* v. *Allis*, 73 Fed. 165, 182 (C. C. E. D. Kans.), affirmed, 155 U. S. 117, and similar to that approved in *Allen* v. *United States*, 164 U. S. 492, 501. See also *United States* v. *Commerford*, 64 F. (2d) 28, 31 (C. C. A. 2), certiorari denied 289 U. S. 759; *Commonwealth* v. *Tuey*, 8 Cush. 1. The charge must be read in its entirety and merely because the court pointed out that it was highly desirable for the jury to return a verdict in order to avoid another long and expensive trial and that they should consider the case "with candor and with proper regard and deference to the opinions of each other" (R. 1111), it does not follow that the jurors were coerced into returning a verdict of guilty. The court repeatedly em-

[11] The entire basis of petitioner's objection to the supplemental charge is conjectural. All that is known is that the jury had been out for a whole day and had not returned a verdict.

phasized that it did not wish any juror to forsake his own conscientious convictions and that the verdict of each juror was to be his own independent opinion and "not a mere acquiescence in the conclusion of his fellows" (R. 1110). Hence it is clear that the court carefully observed the caution about turning "the balance against the accused" voiced in *Burton* v. *United States,* 196 U. S. 283, 306–307, upon which petitioner principally relies (Pet. 45–46). As the court below pointed out the trial judge "said nothing to tilt the scale in the jury's hands" (R. 1276).

Moreover, as the Circuit Court of Appeals stated (R. 1275), "The issues involved in the case were simple, and the evidence of [petitioner's] guilt was so overwhelming that there was little room for reasonable doubt." Should the jury have been unable to agree, it is apparent, from examination of the record, that a miscarriage of justice would have resulted. As this Court has recognized in such a situation the trial judge is warranted in using stronger language than perhaps might be justified where the evidence is more evenly balanced. *Horning* v. *District of Columbia,* 254 U. S. 135, 138–139.

CONCLUSION

The case was correctly decided below, there is no question of general importance, and there is

involved no conflict of decisions warranting certiorari. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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JANUARY 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

Office - Supreme Court, U. S.
FEB 18 1942

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 810.

FRANK J. BOEHM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF FRANK J. BOEHM FOR A REHEARING.

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SUPREME COURT OF THE UNITED STATES.

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FRANK J. BOEHM,
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PETITION FOR REHEARING.

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court:

Comes now the above-named petitioner, Frank J. Boehm, and presents this, his petition for a rehearing in the above-entitled cause and, in support thereof, respectfully shows:

The opinion of the court below held that the trial court was in error in failing to compel production of transcripts of prior testimony given by various witnesses for the Government before representatives of the Securities and Exchange Commission, which, in most instances, was admitted by the witnesses to have been contrary to the testimony given at the trial, and that they had changed their

testimony after having been granted immunity (George K. Miltenberger, R. 568, 569; Eugene K. Kropp, R. 758; L. H. Keller, R. 354; Harry Williamson, R. 467, 907, 908; Rex H. Fowler, R. 398, 399; B. P. Alschuler, R. 386-391). One witness, while admitting the testimony was contradictory, denied any grant of immunity (E. B. Hamilton, R. 491). Another admitted a grant of immunity, but denied any prior contradictory testimony (Herman Spoehrer, R. 635, 638).

The opinion recognized that defendant's right to these transcripts of prior testimony was incident to his right to a fair trial. It was, however, held that this error was not prejudicial, because the appellant (petitioner) had not shown that his substantial rights were prejudiced, and that he had not shown that these transcripts contained any matter which was competent, relevant or material in the defense of his case, despite the fact that refusal by the court to order production of the transcripts made it impossible for him so to do. The court's opinion, as was pointed out in petitioner's Brief in support of his petition for writ of certiorari (p. 27), stated (R. 1263):

> "The contention that appellant would have thrown some light on the issues more favorable to himself if he had had the transcripts is entirely speculative. The evidence affords no ground for any such belief and there is no statement of fact throughout the briefs to justify an inference that such belief really exists."

And (R. 1266):

> "But in this case, where it is apparent that no essential ingredient of the offense was in any way dependent upon any matter contained in the transcripts, and there is no reason to believe that any matter contained therein was competent, relevant or material matter of defense 'to order a new trial would be to violate the standards of Section 269 of the Judicial Code (U. S. C., Sec. 391), since the substantial rights of the defendant were not affected.'"

Thus there was placed upon petitioner the burden of showing prejudicial error and the Court relied upon, as authority for this conclusion, Section 269 of the Judicial Code as amended February 26, 1919 (28 U. S. C. A., Sec. 391).

The rule has always been that in jury trials errors are presumptively injurious or prejudicial, unless it affirmatively appears from the whole record that they were harmless. The enactment of the amendment to Section 269 of the Judicial Code in 1919 did not change this rule. This Court so stated in United States v. River Rouge Co., 269 U. S. 411, 421, 70 L. Ed. 339, 346, 46 S. Ct. 144, and expressly so held in Williams v. Great Southern Lumber Co., 277 U. S. 19, 26, 72 L. Ed. 761, 767, 48 S. Ct. 417 (1928); and again in McCandless v. United States, 298 U. S. 342, 347, 80 L. Ed. 1205, 1209. These cases, and the conflict of the opinion below therewith, were set forth in the petition for certiorari (p. 16) and in the brief in support thereof (pp. 27, 28).

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case, in misconstruing Section 269 of the Judicial Code as amended, and in placing a construction thereon directly contrary to that of this Court, has again fallen into the same error which it consistently, with one exception, has enunciated since the amendment of that Section in 1919. The first of these cases is Rich v. United States, 271 Fed. 566, 569 (8th Circuit, 1921), in which the Court adopted as its understanding of the meaning of Section 269 as amended, an interpretation of that section by the seventh circuit in the case of Haywood v. United States, 268 Fed. 795, holding that this statute changed the rule and placed the burden of showing prejudicial error upon the complaining party.

The next case involving this section by this same court is that of Trope v. United States, 276 Fed. 348, 351 (8th Circuit, 1921), it being there stated:

> "Since the amendment of Section 269 of the Judicial Code (Comp. St. Ann. Supp. 1919, Sec. 1246) the burden is on the plaintiff in error to show from the whole record that some substantial right has been denied to him."

Thereafter the court held to like effect in Furlong v. United States, 10 Fed. (2d) 492, 495 (8th Circuit, 1926); Miller v. United States, 21 Fed. (2d) 32, 36 (8th Circuit, 1927); Salerno v. United States, 61 Fed. (2d) 419, 424 (8th Circuit, 1932); Goldstein v. United States, 63 Fed. (2d) 609, 614 (8th Circuit, 1933); Mansfield v. United States, 76 Fed. (2d) 224, 232 (8th Circuit, 1935), and Morgan v. United States, 98 Fed. (2d) 473, 477 (8th Circuit, 1938). Despite the fact that this Court held directly to the contrary in January, 1926, in United States v. River Rouge Co., supra, it was not until April, 1941, that the eighth circuit recognized that its construction of this section was in conflict with that of this Court. That was in the case of Fort Dodge Hotel Co. v. Bartelt, 119 Fed. (2d) 253, 259, which was a civil case, and the opinion was written by Judge Sanborn, who did not sit in this case below.

We respectfully direct these decisions to the Court's attention to demonstrate that our construction of the opinion of the Circuit Court of Appeals for the Eighth Circuit is not a misinterpretation of this decision, but shows that it is entirely consonant with the construction which that court placed on that section up until twenty-two years after its passage. We reiterate the contention made in the petition for certiorari and brief in support thereof, that the opinion of the court below placed on petitioner the burden of showing that the admitted error was prejudicial, in that it was held, that he made no showing that the transcripts of prior testimony, the right of access to which was denied him, contained relevant, competent or material evidence, which, of course, under these circumstances was

impossible for him to meet, and that in so holding the opinion is in direct conflict with the opinions of this Court in McCandless v. United States, Williams v. Great Southern Lumber Co. and United States v. River Rouge Company, supra.

The Government filed a brief in opposition to the petition for certiorari in this case, the sole theme of which was that the evidence of guilt was so great that there was little room for reasonable doubt, and that failure to convict on the part of the jury would have been a miscarriage of justice. Such an argument not alone is not pertinent to the legal questions presented to this Court on a petition for writ of certiorari, but overlooks the fact that every person accused of crime is, in the prosecution of that accusation, presumed to be innocent, and under the Constitution of this country he is, in the process of the proof of his guilt, entitled to a fair trial, and it is only after his conviction in a fair trial that it can be said he has been accorded his constitutional rights. In the case of Fina v. United States, 46 Fed. (2d) 643 (10th Circuit), the Government filed a brief of similar tenor, and the statement of the Circuit Court of Appeals for the Tenth Circuit with reference to that brief is worthy of note. The court there said (l. c. 645):

> "However, the brief in this case was being prepared, addressed and to be presented to a court of justice to aid that court in the doing of justice to one accused of the commission of a crime—a felony. Hence, in all reason and good conscience, he, and all officers of our courts of justice, should be mindful of the fact that we are now living in a period of our country's life when crime is rampant, a time in which there is a rapidly growing outcry against crime by all good citizens; a time in which there is an ever-increasing insistence upon the part of the public when a crime is discovered to have been perpetrated to cry

> out, as of old, 'Give us a sacrifice to wipe out this blood.' At such a time it is entirely too dangerous to individual liberty, too dangerous to the safety of the citizen, which is or should be the supreme concern of government, to ignore or to attempt to strike down our constitutional safeguards. Indeed, today, more than ever before in our country, our constitutional guaranties, achieved at so much sacrifice of blood and suffering, and written by the strong hands of noble men, become of transcendent importance, guaranteeing, as they do, to the innocent, protection, to the guilty a fair and impartial trial."

Petitioner did not have a fair trial. Denial to him of access to the transcripts of the prior testimony of the principal government witnesses for the purposes of impeachment, to which he was entitled incident to his right to a fair trial, was error. The opinion of the Circuit Court of Appeals so holds. Its further conclusion, that this error was harmless because petitioner made no affirmative showing that it was prejudicial to him, is in direct conflict with the decisions of this court as set forth in the petition for certiorari and again hereinabove. Furthermore, when it is considered that a jury of twelve men were, after twenty-six hours of deliberation, unable to agree, and it required a supplemental instruction of the character given in this case to obtain a conviction, the conclusion seems inescapable that it was prejudicial error.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that upon further consideration the petition for a writ of certiorari be granted.

Respectfully submitted,

JOHN S. LEAHY,
Counsel for Petitioner.

Certificate of Counsel.

I, John S. Leahy, counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

John S. Leahy,
Counsel for Petitioner.